NO. 80-1882

Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

CHAPMAN,

Petitioner,

v.

THE DOW CHEMICAL COMPANY, DIAMOND SHAMROCK CORPORATION, MONSANTO COMPANY, THOMPSON-HAYWARD CHEMICAL COMPANY, and HERCULES INCORPORATED,

Respondents.

(IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION

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Question Presented

Should the Supreme Court grant a writ of certiorari to review a decision by the United States Court of Appeals for the Second Circuit, in which that Court held that plaintiffs' claims in the Agent Orange Product Liability Litigation do not arise under federal common law, when that ruling is in accord with long-established principles of federal common law laid down by this Court.

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BRIEF IN OPPOSITION TO PETITION

Opinion Below

Respondent The Dow Chemical Company* submits this brief in opposition to petitioner's request that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit, *In re Agent Orange Product Liability Litigation*, reported at 635 F.2d 987 and entered November 24, 1980.

Statutory Provision Involved

The statutory provision quoted by petitioner, 28 U.S.C. 1331(a), has been amended. It now provides:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The amendment was made applicable to pending cases pursuant to Section 4 of the Federal Question Jurisdictional Amendmnts Act of 1980. Publ. L. No. 96-486, Sec. 4, 94 Stat. 2370 (1980).

Counterstatement of the Case

This is a products liability action against the manufacturers of the defoliant Agent Orange which was used by the United States military in the armed conflict in Vietnam. Plaintiffs are veterans of that conflict and members of their families who are seeking to recover damages from the manufacturers for personal injuries.

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* Dow's statement pursuant to Supreme Court Rule 28.1 is annexed hereto as Appendix A.

It is claimed that plaintiff veterans were exposed to and came in contact with Agent Orange while serving in Vietnam, and that this exposure and contact is the cause of plaintiffs' alleged damages.

Although plaintiffs' complaint purports to assert claims sounding in negligence, breach of warranty, and strict products liability—remedies traditionally available under state tort law—plaintiffs seek to have their claims governed by a yet-to-be fashioned federal common law. Indeed, it is plaintiffs' contention that federal common law by itself provides a basis for federal question jurisdiction over their claims, pursuant to 28 U.S.C. 1331(a).

In response to the allegation in plaintiffs' complaint that their tort claims arise under federal common law, the defendants moved to dismiss for lack of subject matter jurisdiction. That motion was denied by the District Court. *In re "Agent Orange" Product Liability Litigation,* 506 F. Supp. 737 (E.D.N.Y. 1979). On November 24, 1980, the Second Circuit reversed, correctly holding that there was no "identifiable federal policy at stake in this litigation that warrants the creation of federal common law rules." *In re "Agent Orange" Product Liability Litigation,* 635 F. 2d 987, 993 (2nd Cir. 1980).

As a result of the Second Circuit's decision, plaintiffs have no remedy under federal law with respect to their Agent Orange tort claims. However, notwithstanding plaintiffs' argument to the contrary, the courthouse door has not been closed to the plaintiffs. The Second Circuit simply refused to displace traditional state tort law with federal common law rules. Thus, plaintiffs are free to pursue their state law claims in state court or in federal court on the basis of diversity of citizenship.

The decision of the Second Circuit is consistent with long established and recently reaffirmed principles of federal common law as laid down by this Court. For this reason, plaintiffs' petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

POINT ONE

The Court of Appeals correctly held that plaintiffs' claims do not arise under federal common law.

Recognizing that federal common law is the exception rather than the rule, and that there is no reason to displace state tort law in this case, the Second Circuit correctly declined to expand federal common law to plaintiffs' Agent Orange claims. In reaching its decision, the Circuit Court recognized the distinction between two categories of Supreme Court federal common law cases relied upon by plaintiffs in support of their jurisdictional argument. The Court properly concluded that the two theories underlying federal common law as set forth in those cases are inapplicable to this action.

In one line of cases, the Supreme Court has held that federal common law may apply if the United States is a party to the lawsuit, the government's rights and duties are directly implicated, and the government's purse is directly affected. Federal common law may apply in such a case since "the Government's paramount power of control over its own property" is at stake. *United States* v. *Standard Oil Co. of California*, 332 U.S. 301, 306 (1947). In addition, when the United States is a party, there is a need for "uniform national treatment rather than

diversified local disposition . . ." *United States* v. *Standard Oil, supra* at 311. See also *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 367 (1943):

> "The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain."

Plaintiffs place great reliance on the rationale of the *Standard Oil* and *Clearfield* cases, arguing that there is a need to apply a uniform federal rule to their tort claims against the manufacturers of Agent Orange. But this reliance is misplaced. As is made clear in *Standard Oil* and *Clearfield,* the need for uniformity of decision exists only in cases where the United States is a party and its rights and duties are directly at issue. Accord: *Miree* v. *DeKalb County,* 433 U.S. 25, 28-29 (1977). However, the Agent Orange matter is not such a case—the United States is simply not a party to the plaintiff's claims here. Thus, the Second Circuit correctly observed, at 635 F.2d 994:

> "The fact that application of state law may produce a variety of results is of no moment. It is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens. That alone is not grounds in private litigation for judicially creating and overriding federal law."

In a second line of cases, the Supreme Court has set forth a test for determining whether federal common law

may apply to disputes involving purely private parties, such as the Agent Orange litigation. Quoting from *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966), the Court said, in *Miree* v. *DeKalb County, supra* at 31:

> "In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a *significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.*" (Emphasis in original.)

Under this test, the proper conclusion is that federal common law does not apply to plaintiffs' claims. In this connection, the Second Circuit held, at 635 F.2d 993, that there is no "identifiable federal policy at stake in this litigation that warrants the creation of federal common law rules."

The only purported federal policy relied upon by plaintiffs is one which assertedly requires the application of a uniform federal rule to tort claims by former servicemen against private companies. The Second Circuit correctly found that no such federal policy or interest exists:

> "Since this litigation is between private parties and no substantial rights or duties of the government hinge on its outcome, there is no federal interest in uniformity for its own sake." 635 F.2d at 993.

This conclusion is strengthened by the fact that there is no federal statute which reflects a concern by Congress for the uniform treatment of the particular types of claims asserted in this litigation. While the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.*, reflects a federal policy for uniform compensation from the United States for service-connected injuries, that statute is silent on

whether a uniform federal common law should displace state tort law which differs from one jurisdiction to the next but which has traditionally been applied to the claims of servicemen against private companies for injuries arising from their military service. *See, e.g., Whitaker* v. *Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969); *Boeing Airplane Co.* v. *Brown*, 291 F.2d 310 (9th Cir. 1961); and *Adams* v. *General Dynamics Corp.*, 405 F. Supp. 1020 (N.D. Cal. 1975), *aff'd*, 535 F.2d 489 (9th Cir. 1976). Indeed, the fact that the Veterans' Benefits Act does not reflect a Congressional concern for the uniform treatment of plaintiffs' tort claims should be dispositive of plaintiffs' federal common law argument. As the Second Circuit said, at 635 F.2d 995:

> "It is one thing to *discern* a federal regulatory scheme from the statutes Congress has enacted, as in *Owens*; it is another to *devise* such a scheme in the face of inaction by Congress." (Emphasis in original.)*

Two recent decisions by this Court have reaffirmed the long-standing principle that federal courts should refrain from fashioning federal common law in the absence of a clearly-defined federal policy. More importantly, those decisions make clear that federal lawmaking is primarily

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* The *Owens* case referred to above is *Owens* v. *Haas*, 601 F.2d 1242 (2nd Cir.), *cert. denied*, 444 U.S. 980 (1979). In that case, the Second Circuit held that there was a clearly definable federal policy, as embodied in an act of Congress, which required uniformity of treatment with respect to claims asserted by federal prisoners as third-party beneficiaries of a contract between the United States and a local government. *Owens* is thus distinguishable from the *Agent Orange* case since no clearly definable federal policy exists which requires uniformity of treatment with respect to plaintiffs' tort claims.

the responsibility of Congress and not the courts. Thus, the Court said, in *Northwest Airlines, Inc.* v. *Transport Workers Union of America*, —— U.S. ——, 49 U.S.L.W. 4383, 4388 (April 20, 1981):

> "(W)e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of the government; therefore, federal common law is 'subject to the paramount authority of Congress.'"

See also City of Milwaukee v. *Illinois*, —— U.S. ——, 49 U.S.L.W. 4445, 4447 (April 28, 1981):

> "The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress."

As Congress has not enacted legislation which reflects a policy favoring the application of federal law to plaintiffs' claims, it is not the role of the federal judiciary to fashion such a body of law on its own. Absent such legislation, the Second Circuit acted properly in refusing to displace state tort law in favor of a federal common law of products liability. Concepts of federalism and separation of powers required the Second Circuit to decide as it did. Congress will have the last word, if it chooses. There is no need for further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: May 28, 1981.

Respectfully submitted,

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APPENDIX A

Pursuant to Supreme Court Rule 28.1, the following is a list of names of the non-wholly owned subsidiaries of the Dow Chemical Company:

Arabian Chemical Company

Teijin Bio-Science Laboratories, Inc.

Compagnie des Services Dowell Schumberger

Chief Shipping Company

Cordis Dow Corp.

Dow Banking Corporation

Asahi-Dow Limited

Cromarty Petroleum Company Ltd.

Dow Chemical Iberica S.A.

Ivon Watkins-Dow Limited

Petroquimica-Dow S.A.

MT Partnership

Wabiskaw Explorations Limited

Dow Corning Corporation

Dowell Schlumberger Corporation

El Dorado Terminals Company

Gruppo Lepetit S.p.A.

Lepetit Pharmaghreb

Lepetit S.A.

Lepetit (Thailand) Co. Ltd.

Korea Pacific Chemical Corporation

Ecuatorianos LIFE
Pacific Chemicals Berhad
Nacionais S.A.
The D-H Titanium Company
The Kartridg Pak Co.